ORIGINAL

No. 88-6078

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

DeWAYNE C. BRITZ,

Petitioner,

-vs-

THE PEOPLE OF THE STATE OF ILLINOIS

Respondent.

On Petition for A Writ of Habeas Corpus
to The Illinois Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Supreme Court erred in its holding that in view of this Court's decision in California v. Brown, 479 U.S. 538 (1987), an instruction to the jury following petitioner's capital sentencing hearing did not violate the eighth and fourteenth amendments.

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OPINION BELOW

The opinion of the Illinois Supreme Court is reported at People v. Britz, 123 Ill.2d 446, 528 N.E.2d 708 (1988). The opinion has been submitted to this Court as Appendix A to the Petition for Writ of Certiorari and, therefore, is not contained in the Brief in Opposition.

JURISDSICTION

The jurisdiction of this court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner, DeWayne C. Britz, on February 14, 1985, was charged in Sangamon County, Illinois, with murder, aggravated kidnapping, aggravated criminal sexual assault, armed robbery and concealment of a homicidal death. The charges followed the death of Mimi C. Covert on January 16, 1985. Following a jury trial, defendant was found guilty of the offenses and sentenced to death for murder.

Petitioner appealed his conviction and sentence of death to the Illinois Supreme Court. The court affirmed the judgment of the circuit court. People v. Britz, 123 Ill.2d 446, 528 N.E.2d 708 (1988). Petitioner now seeks review of the decision by this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the judgment of the Illinois Supreme Court. The petition presents a single issue for review: "Whether the Eighth and Fourteenth Amendments were violated when the jury was instructed that sympathy should not influence its decision whether or not to impose the death penalty?" Petition for Writ of Certiorari at i) This Court should decline to exercise its discretion to grant petitioner's Petition for Writ of Certiorari where the Illinois Supreme Court rejected petitioner's argument with respect to a jury instruction based upon this Court's decision in California v. Brown, 479 U.S. 538 (1987). Respondent maintains where the Illinois Supreme Court's decision is based upon California v. Brown, it would not be prudent for this Court to grant the Petition for Writ of Certiorari.

THE ILLINOIS SUPREME COURT DID NOT ERR IN ITS HOLDING THAT IN VIEW OF THIS COURT'S DECISION IN CALIFORNIA V. BROWN, 479 U.S. 538 (1987), AN INSTRUCTION TO THE JURY FOLLOWING PETITIONER'S CAPITAL SENTENCING HEARING DID NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner brings the present action following the decision by the Illinois Supreme Court wherein it rejected petitioner's claim with respect to a instruction given to the jury following petitioner's capital sentencing hearing. Petitioner claimed in the court below that the jury instruction that "[n]either sympathy nor prejudice should influence you" violated the eighth and fourteenth amendments to the United States Constitution. The Illinois Supreme Court rejected petitioner's contention based upon this Court's recent decision in California v. Brown, 479 U.S. 538 (1987). This Court held in Brown that a jury instruction given during the penalty phase of a capital murder trial that instructed the jurors that they must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" did not violate the eighth and fourteenth amendments. Id. at 542.

The Illinois Supreme Court in the case at bar, reaffirmed its decision with respect to the jury instruction made in People v. Stewart, 104 Ill.2d 463, 473 N.E.2d 1227 (1984), cert. denied, 471 U.S. 1120 (1985). The court in Stewart found that since the jury was instructed that it could consider "any other facts or circumstances that provide reasons for imposing less than the death penalty" and defendant was permitted to introduce all evidence he considered mitigating, defendant's right to a fair hearing was not violated. Id. at 494, 473 N.E.2d at 1241. See also People v. Spreitzer, 123 Ill.2d 1, 525 N.E.2d 30, 47 (1988), cert. denied ___ U.S. ___, People v. Emerson, 122 Ill.2d 411, 522 N.E.2d 1109, 1122 (1987) cert. denied, ___ U.S. ___, 109 S.Ct. 246 (1988), People v. Perez, 108 Ill.2d 70, 483 N.E.2d 250 (1985), cert. denied, ____ U.S. ____, 106 S.Ct. 898 (1986), People v. Wright, 111 Ill.2d 128, 490 N.E.2d 640, cert. denied, ___ U.S. ___, 107 S.Ct. 1327 (1987), People v. Morgan, 112 Ill.2d 111, 492 N.E.2d 1303 (1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1329 (1987), People v. Olinger, 112 Ill.2d 324, 493 N.E.2d 579 (1986), cert. denied, ___ U.S. ___, 107 S.Ct. 1329 (1987).

Similarly, in the case at bar, the Illinois Supreme Court found that nearly the same instructions as in Stewart were given and petitioner was allowed to present evidence of his alleged drug and alcohol abuse disorder. The court held that petitioner was not denied a fair sentencing hearing. Where the decision of the Illinois Supreme Court does not depart from the precedential authority of California v. Brown, this Court should decline to grant the Petition fro Writ of Certiorari.

Petitioner's reliance on Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) to support his position that the "Illinois Supreme Court's decision conflicts with a decision of the Tenth Circuit Court of Appeals" is misplaced. (Petition for Writ of Certiorari at 4) In Parks, the trial court instructed a capital sentencing jury that "[y]ou must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." Id. at 1552. The United

States Court of Appeals for the Tenth Circuit held that the instruction created an impermissible risk that the jury did not fully consider all mitigating evidence.

This Court should not find persuasive petitioner's argument that a conflict exists based upon the decision in Parks v. Brown where the Illinois Supreme Court found based on all the instructions that the single instruction now challenged by the petitioner did not preclude the jury from considering petitioner's mitigating evidence. Thus, this Court should deny petitioner's request for a writ of certiorari.

CONCLUSION

For the above-advanced reasons, respondent respectfully requests this Court to deny the Petition for Writ of Certiorari.

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-vs-

THE PEOPLE OF THE STATE OF ILLINOIS

Respondent.

CERTIFICATE OF SERVICE AND
STATEMENT OF TIMELY FILING

I, Kenneth A. Fedinets, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Joseph Spaniol, Clerk
United States Supreme Court
Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served, to wit:

Theodore A. Gottfried
State Appellate Defender
Office of the State Appellate Defender
300 East Monroe Street
Suite 100
Springfield, Illinois 62701

I further state that this mailing took place on January 4, 1989, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: Kenneth A. Fedinets

KENNETH A. FEDINETS
Assistant Attorney General
100 West Randolph Street
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SUBSCRIBED and SWORN to
before me this 4th day of
January, 1989.

NOTARY PUBLIC

" OFFICIAL SEAL "
NORENE RUDD
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 12/1/91

OPINION

SUPREME COURT OF THE UNITED STATES

DEWAYNE C. BRITZ, PETITIONER *v.* ILLINOIS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

No. 88-6078. Decided February 21, 1989

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for writ of certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to consider whether a jury instruction that sympathy should not influence a decision regarding the imposition of the death penalty violates the Eighth and Fourteenth Amendments.

I

Dewayne C. Britz was convicted of murder, aggravated kidnaping, aggravated criminal sexual assault, armed robbery and concealment of a homicidal death. At the penalty phase, the trial judge charged the jury that "'[n]either sympathy nor prejudice should influence you.'" 123 Ill. 2d 446, 479, 528 N. E. 2d 703, 719 (1988), quoting Illinois Pattern Jury Instructions, Criminal, No. 1.01 (2d ed. 1981). Defense counsel specifically objected to this instruction. The jury unanimously found that statutory aggravating factors existed and that no mitigating factors precluded the imposition of the death sentence. Petitioner was sentenced to death.

The Illinois Supreme Court affirmed. 123 Ill. 2d 446, 528 N. E. 2d 703 (1988). The court held that the trial court's

no-sympathy jury instruction was similar to the instruction approved in *California* v. *Brown*, 479 U. S. 538 (1987). Relying on its decision in *People* v. *Stewart*, 104 Ill. 2d 463, 473 N. E. 2d 1227 (1984), cert. denied, 471 U. S. 1120 (1985), the court further held that the instruction did not deny petitioner a fair trial because the jury was also instructed that it could consider any other facts or circumstances that favored imposition of a sentence other than death, and because the defendant was permitted to introduce all evidence he considered mitigating, including evidence ruled inadmissible during the guilt phase.

II

We have recognized repeatedly that, in a capital case, the sentencer must not be precluded from considering any mitigating evidence relating to the defendant or the crime. See, *e. g.*, *Eddings* v. *Oklahoma*, 455 U. S. 104, 111–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978). Mitigating evidence is allowed at the penalty phase so the sentencer may consider "compassionate . . . factors stemming from the diverse frailties of humankind." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976). "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Gregg* v. *Georgia*, *supra*, at 199; see also *Caldwell* v. *Mississippi*, 472 U. S. 320, 330–331 (1985).

The Court reaffirmed the importance of considering mitigating evidence in *California* v. *Brown*, *supra*. There, the trial judge instructed the jury that it must not be swayed by "'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling.'" 479 U. S., at 542. The majority held that this instruction did not violate the Eighth and Fourteenth Amendments for two reasons. First, it found that the word "mere" informed the jury "to ignore *only* the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." *Ibid.* (emphasis added). "By concentrating on the noun 'sympathy,'" the

defendant had "ignore[d] the crucial fact that the jury was instructed to avoid basing its decision on *mere* sympathy." *Ibid.* (emphasis in original). Second, the majority deemed it "highly unlikely that any reasonable juror would almost perversely single out the word 'sympathy' from the other nouns which accompany it in the instruction: conjecture, passion, prejudice, public opinion, or public feeling." *Id.*, at 542–543. "Reading the instruction as a whole," *id.*, at 543, a rational juror could only conclude that the instruction was intended simply to confine the jury's deliberations to considerations arising from the evidence presented.

Neither of the reasons relied upon by the majority to uphold the instruction in *California* v. *Brown*, *supra*, is applicable to the jury instruction at issue in this case. Here, the jury was informed that sympathy should not influence its decision *under any circumstances*. The trial court's all-inclusive no-sympathy instruction, thus, embraced sympathy engendered by facts in the record as well as sympathy engendered by "extraneous emotional factors." *Ibid.* Furthermore, unlike the instruction in *Brown*, the instruction here was not contained in "a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty." *Ibid.* Reasonable jurors, therefore, may well have thought they were not permitted to exercise mercy or compassion when sentencing petitioner, even if such feelings were "rooted" in the evidence. *Id.*, at 542.

III

The constitutionality of a general no-sympathy instruction is a recurring issue on which the lower courts have differed. Compare *Byrne* v. *Butler*, 847 F. 2d 1135 (CA5 1988), and *State* v. *Clemmons*, 753 S. W. 2d 901 (Mo. 1988) (en banc), cert. denied, 488 U. S. —— (1988) with *People* v. *Hamilton*, 46 Cal. 3d 123, 152 and n. 7, 756 P. 2d 1348, 1364–1365 and n. 7, cert. denied, 488 U. S. —— (1989), and *Parks* v. *Brown*, 860 F. 2d 1545, 1559 (CA10 1988). The petition

should be granted in order to resolve this conflict and to address this important issue. I dissent.